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NTSB Order No. EA-3657

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 11th day of August , 1992

THOMAS C. RICHARDS,
Administrator,
Federal Aviation Administration,

Complainant,

Docket SE-10301

v.

JOSEPH J. BREA,

Respondent.

OPINION AND ORDER

Respondent has appealed from an initial decision of Administrative Law Judge Joyce Capps, issued orally at the conclusion of an evidentiary hearing held on March 2, 1990.¹ By that decision, the law judge affirmed an order of the Administrator suspending the inspection authorization portion of respondent's mechanic certificate for 60 days, for an alleged violation of section 43.15(a) of the Federal Aviation Regulations

¹An excerpt from the transcript containing the initial decision is attached.

("FAR," 49 C.F.R.) stemming from the failure of an aircraft maintenance facility which he operated to perform tests required by two airworthiness directives in connection with an annual inspection of a Piper PA-34 aircraft conducted on April 27, 1988.² As a result of amendments to the order of suspension made by the Administrator following the submission of respondent's appeal, the alleged section 43.15(a) violation now relates solely to a failure to perform tests associated with one of the airworthiness directives initially cited and the sanction sought for that averred FAR violation is a 30-day suspension of respondent's inspection privileges.

On appeal, respondent has, among other things, contended that the law judge should have dismissed the Administrator's complaint as stale pursuant to Rule 33 of the Board's Rules of Practice.³ For the reasons set forth below, we concur in that

²FAR § 43.15(a) provides in pertinent part:

"§ 43.15 Additional performance rules for inspections.

(a) General. Each person performing an inspection required by Part 91, 123, 125, or 135 of this chapter shall--

(1) Perform the inspection so as to determine whether the aircraft, or portion(s) thereof under inspection, meets all applicable airworthiness requirements."

³49 C.F.R. § 821.33, which provides in relevant part:

"§ 821.33 Motion to dismiss stale complaint.

Where the complaint states allegations of offenses which occurred more than 6 months prior to the Administrator's advising respondent as to reasons for the proposed action under section 609 of the [Federal Aviation] Act, respondent may move to dismiss such allegations pursuant to the following provisions:

(a) In those cases where a complaint does not allege lack of qualification of a certificate holder:

(1) The Administrator shall be required to show by answer filed within 15 days of service of the motion that good cause
(continued. ..)

view and will, therefore, grant respondent³ appeal and reverse the initial decision.

The record in this case indicates that the Administrator did not become aware of the alleged failure of respondent's aircraft maintenance facility to perform the tests required by the airworthiness directive in question until mid-December 1988, approximately eight months following the inspection at issue. According to the Administrator, a letter of investigation was issued on December 19. The notice of proposed certificate action was subsequently mailed to respondent on March 15, 1989, and was received by him on March 20, almost 11 months after the inspection in question occurred and more than three months after the Administrator gained knowledge that the inspection may have failed to comply with the provisions of FAR section 43.15(a) .

In situations such as this, where the possibility of an FAR violation is not reported or discovered contemporaneously, the Administrator's belated awareness thereof may serve as good cause for a delay in the issuance of a notice of proposed certificate action, provided that reasonable prosecutorial diligence is exercised after his receipt of information concerning the act(s) or omission(s) which may be indicative of such a violation.

Administrator v. Zanlunghi, 3 NTSB 3696, 3697 (1981) . This due

³(continued)
existed for the delay

(2) If the Administrator does not establish good cause for the delay . . . , the law judge shall dismiss the stale allegations and proceed to adjudicate the remaining portion, if any, of the complaint."

diligence requirement stems from the Board's belief that Rule 33 raises a presumption that a lapse of more than six months between the occurrence of an alleged FAR violation and the issuance of a notice of proposed certificate action relating thereto prejudices a respondent in the presentation of his defense to the charges levelled by the Administrator.⁴ Thus, in Zanlunghi we held that the Administrator is compelled "to investigate or process [the] case expeditiously" after he belatedly learns of a potential FAR violations.⁵ In opinions issued subsequent to Zanlunghi, the Board has indicated that the Administrator must show that such cases are processed "with greater dispatch than they would otherwise receive" in order to avoid running afoul of Rule 33.⁶

Applying that standard to the facts of this case, the Board notes that, at the hearing, the Administrator's counsel acknowledged that the "main reason" for the more than three month gap between the time the Administrator gained knowledge of respondent's alleged section 43.15(a) violation and the time respondent was notified of the proposed certificate action was that there had been a "typing backlog" at the regional office that was handling the prosecution of the case.⁷ While counsel also noted that "it took a period of time to gather up the

⁴See Administrator v. Parish, 3 NTSB 3474, 3474 (1981).

⁵3 NTSB at 3698.

⁶Administrator v. Lujan, 4 NTSB 153, 154 (1982). See also Administrator v. Pacholke, 5 NTSB 467, 470 (1985) .

⁷Tr. 11-12.

evidence,"⁸ the record fails to reflect that the investigation of this matter was either sufficiently lengthy or complex in nature to fully warrant the Administrator's delay in informing respondent of the proposed certificate action. Moreover, the Administrator has neither asserted nor demonstrated that the processing of the case was in any way expedited so as to minimize the delay once he became aware of respondent's alleged FAR violation. Thus, we do not believe that good cause for the Administrator's delay in notifying respondent of the proposed certificate action until almost 11 months after the alleged FAR violation occurred has been established, and we, therefore, find that his complaint must be dismissed as stale under Rule 33.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is granted;
2. The initial decision is reversed; and
3. The Administrator's complaint is dismissed.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART, and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

⁸Id. 12.